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No. 09-87

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In The

Supreme Court of the United States

GINGER MARTINEZ, individually and as Personal Representative of the Estate of Kenneth Wayne Ginn,

Petitioner,

v.

DeWAYNE BEGGS, as Sheriff of Cleveland County; DAVID EPPS; KEVIN BRANDON; CLEVELAND COUNTY BOARD OF COUNTY COMMISSIONERS; TOMMY EDWARDS; GILBERT KIRKLAND,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the County can be held liable under 42 U.S.C. § 1983 when there has been no underlying violation of the United States Constitution by its officers.

2. Whether the County Officers and the County were deliberately indifferent to Decedent's serious medical needs when he was arrested, and then booked into the County jail, and then later died of a heart attack.

3. Whether the County Officers and the County had notice that Decedent had a serious medical need, whether an inference could be drawn that a substantial risk of serious harm existed and whether they actually drew the inference.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 3

I. THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEAL WITH REGARD TO THE REQUIREMENT THAT THERE BE AN UNDERLYING CONSTITUTIONAL VIOLATION BEFORE A COUNTY OR MUNICIPALITY CAN BE HELD LIABLE UNDER 42 U.S.C. § 1983 .. 3

II. THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY HELD THAT SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE COUNTY OFFICERS AND THE COUNTY; THERE WAS NO DELIBERATE INDIFFERENCE TO ANY SERIOUS MEDICAL NEED INVOLVING DECEDENT GINN.... 8

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Adams v. Auburn Hills, 336 F.3d 515 (6th Cir. 2003) 6

Bukowsky v. City of Akron, 326 F.3d 702 (6th Cir. 2003) 7

Cagle v. Sutherland, 334 F.3d 980 (11th Cir. 2003) 6

Camuglia v. City of Albuquerque, 448 F.3d 1214 (10th Cir. 2006) 6

Case v. Eslinger, 555 F.3d 1317 (11th Cir. 2009) 4

City of Los Angeles v. Heller, 475 U.S. 796 (1986) 4

Cook ex rel. Tessier v. Sheriff of Monroe County, 402 F.3d 1092 (11th Cir. 2005) 6

Estate of Hocker v. Walsh, 22 F.3d 995 (10th Cir. 1994) 10

Estate of Larsen ex rel. Sturdivan v. Murr, 511 F.3d 1255 (10th Cir. 2008) 5

Farmer v. Brennan, 511 U.S. 825 (1994) 9, 10

Findlay v. City of Tulsa, 561 P.2d 980 (Okla. Crim. App. 1997) 14

Graves v. Thomas, 450 F.3d 1215 (10th Cir. 2006) 6

Hall v. County of Nemaha, 509 F. Supp. 2d 821 (D. Neb. 2007) 11

TABLE OF AUTHORITIES – Continued

Page

Hines v. Henson, 293 Fed. Appx. 261 (5th Cir. 2008) 10

Jenkins v. Bartlett, 487 F.3d 482 (7th Cir. 2007) 5

Jennings v. City of Stillwater, 383 F.3d 1199 (10th Cir. 2004) 6

Kiser v. City of Huron, 219 F.3d 814 (8th Cir. 2000) 7

Livsey v. Salt Lake County, 275 F.3d 952 (10th Cir. 2001) 7

Long v. City and County of Honolulu, 511 F.3d 901 (9th Cir. 2007) 5

Martinez v. Beggs, 563 F.3d 1082 (10th Cir. 2009) ..... *passim*

Mecham v. Frazier, 500 F.3d 1200 (10th Cir. 2007) 5

Patrick v. Lewis, 397 F. Supp. 2d 1134 (D. Minn. 2005) 11

Proffitt v. Ridgway, 279 F.3d 503 (7th Cir. 2002) 7

Scott v. Clay County, 205 F.3d 867 (6th Cir. 2000) 7

Segal v. City of New York, 459 F.3d 207 (2d Cir. 2006) 5

Trigalet v. City of Tulsa, 239 F.3d 1150 (10th Cir. 2001) 7

Woodward v. Correctional Medical Services, 368 F.3d 917 (7th Cir. 2004) 6

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1983 .....*passim*

OKLAHOMA STATUTES

Okla. Stat. tit. 47, §§ 751-754 14

Okla. Stat. tit. 51, §§ 151-172 .....1, 3

COUNTER-STATEMENT OF THE CASE

Petitioner Martinez, individually and on behalf of the estate of her father, brought this lawsuit under 42 U.S.C. § 1983, and the Oklahoma Governmental Tort Claim Act, Okla. Stat. tit. 51, §§ 151-172, against Respondents DeWayne Beggs, Sheriff of Cleveland County, Kevin Brandon, David Epps, James Bullard, Tommy Edwards, and Gilbert Kirkland ("County Officers"), and the Board of County Commissioners of Cleveland County ("County"), regarding the death of Kenneth Wayne Ginn ("Ginn") in the Cleveland County Detention Center ("CCDC").

Ginn was arrested on the charge of public intoxication and placed in the CCDC on May 2, 2006. Aplt. App. at 101.[1] Ginn was 49 years old at the time of his death. When Ginn was arrested, even though he did not appear to be injured in any way, Kirkland, the first deputy on the scene offered him medical assistance, but Ginn declined his offer. Aplt. App. at 92; 101. At the time of his arrest and incarceration, Ginn appeared to be intoxicated, was belligerent and combative with the deputies, did not appear to be injured, recognized persons around him, and he was able to walk. Aplt. App. at 92; 101; 108. Although intoxicated, Ginn was cognizant of his surroundings and his circumstances, and was argumentative with

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[1] Aplt. App. at ___, refers to the record filed in United States Court of Appeals in this case.

the deputies regarding the fact that he had been arrested. Aplt. App. at 93; 108-109.

Ginn was taken by Kirkland to the CCDC. Aplt. App. at 93-94. After his arrival at the CCDC, Ginn was able to walk into the building with the assistance of jailers. Ginn never complained to Kirkland of any injury or illness, and he did not appear at any time to be injured or ill. Aplt. App. at 92; 94; 96; 101.

When Ginn was placed in his cell at the CCDC, Ginn was able to follow the instructions of the jailers. Aplt. App. at 120. When the jailers left Ginn, he was conscious. Aplt. App. at 120.

Approximately three hours after he was placed in a CCDC receiving cell, he was found unconscious and determined to be dead. Aplt. App. at 126-127. The Medical Examiner determined that the cause of death was "[s]udden heart attack due to coronary artery disease." Aplt. App. at 134. At the time of the autopsy, Ginn's blood alcohol level was .32. Aplt. App. at 135.

In order to recover under 42 U.S.C. § 1983 against any of the County Officers, or the County, Martinez was required to show that the officers were deliberately indifferent to Ginn's serious medical needs, and that this was the cause of his death. The District Court correctly held that Martinez failed to do this.

In its Order of January 24, 2008, the District Court granted summary judgment in favor of all Defendants. On April 21, 2009, the Tenth Circuit

upheld the granting of summary judgment in favor of all County Officers, and the County. *Martinez v. Beggs*, 563 F.3d 1082 (10th Cir. 2009).

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE COURTS OF APPEAL WITH REGARD TO THE REQUIREMENT THAT THERE BE AN UNDERLYING CONSTITUTIONAL VIOLATION BEFORE A COUNTY OR MUNICIPALITY CAN BE HELD LIABLE UNDER 42 U.S.C. § 1983.

Petitioner Martinez brought this lawsuit under 42 U.S.C. § 1983 against County Officers DeWayne Beggs, Sheriff of Cleveland County, Kevin Brandon, David Epps, James Bullard, Tommy Edwards, and Gilbert Kirkland, and under the Oklahoma Governmental Tort Claim Act, Okla. Stat. tit. 51, §§ 151-172, against the Board of County Commissioners of Cleveland County ("County") regarding the death of Kenneth Wayne Ginn ("Ginn") in the Cleveland County Detention Center ("CCDC") on May 2, 2006.

In this case, *Martinez v. Beggs*, 563 F.3d 1082, 1091 (10th Cir. 2009), the Tenth Circuit held that the sheriff and county were not liable because there was no showing of any underlying constitutional violation by any of its officers. The court of appeals also held that Sheriff Beggs could not be held liable in his

individual capacity or for implementing county policies or for the actions of county officers under a theory of supervisory liability, when there was no violation of Ginn's constitutional rights. *Id.* at 1092.

With regard to the plaintiff's claim that the county may still be liable for a "systemic injury" caused by the interactive behavior of several government officials, each of whom may be acting in good faith, the court held that even under this theory, a municipality cannot be held liable for constitutional violations where there was no underlying constitutional violation by any of its officers. *Id.* at 1092.

In her Petition at 14, Petitioner claims that courts have split on the question of whether a county (or a municipality) can be held liable for violating a person's constitutional rights when there is no underlying constitutional violation by any of its officers. This is an incorrect statement. The Tenth Circuit's ruling in *Martinez* followed that of the Supreme Court in *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (if officer acted constitutionally, city cannot be held liable; a municipality cannot be held liable under § 1983 in the absence of an underlying constitutional violation).

The opinion of the Tenth Circuit in the present case was also consistent with its own precedent, and with all other courts of appeals decisions around the country. *See, e.g.*, *Case v. Eslinger*, 555 F.3d 1317, 1328 (11th Cir. 2009) (holding that the sheriff and the city were also entitled to summary judgment because

§ 1983 does not authorize the award of damages against a municipal corporation based on the actions of one of its officers when in fact the officer inflicted no constitutional harm); *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1264 (10th Cir. 2008) (to establish a prima facie case for failure to train or supervise in an excessive force case, a plaintiff must demonstrate the officers in question exceeded the constitutional limitations on the use of force; holding that since no constitutional violation occurred, the estate of a person shot by the police could not proceed on this § 1983 claim); *Long v. City and County of Honolulu*, 511 F.3d 901, 907 (9th Cir. 2007) (a police officer acted reasonably in using deadly force to shoot and kill an armed suspect who had barricaded himself in his residence, because the officer had probable cause to believe that the suspect posed an immediate threat of serious physical harm to him and other officers; therefore, the city could not be held liable under § 1983, holding that if no constitutional violation occurred, the municipality cannot be held liable); *Mecham v. Frazier*, 500 F.3d 1200, 1205 n.5 (10th Cir. 2007) (if a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point); *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007) ("there can be no liability under *Monell* for failure to train where when there has been no violation of the plaintiff's constitutional rights."); *Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006) (holding

that absent an underlying constitutional violation arising from the dismissal of the probationary teacher, there was no basis for a *Monell* liability against the city for an alleged failure to train a municipal investigator who prepared the report in the teacher's case); *Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006) (stating that a municipality may not be held liable where there was no underlying constitutional violation by any of its officers); *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1223 (10th Cir. 2006) ("'A municipality may not be held liable for an alleged civil rights violation where there was no underlying constitutional violation by any of its officers.'"); *Cook ex rel. Tessier v. Sheriff of Monroe County*, 402 F.3d 1092, 1115 (11th Cir. 2005) ("A § 1983 claim is predicated on an alleged violation of an underlying constitutional right."); *Jennings v. City of Stillwater*, 383 F.3d 1199, 1205 n.1 (10th Cir. 2004) (noting that a municipality cannot be held liable for constitutional violations unless its officers committed a constitutional violation); *Woodward v. Correctional Medical Services*, 368 F.3d 917, 929 (7th Cir. 2004) (noting that a municipality cannot be found liable if there is no finding that the individual officer is liable on the underlying substantive harm); *Adams v. Auburn Hills*, 336 F.3d 515, 520 (6th Cir. 2003) (holding that without an underlying constitutional violation, the question of whether the officer was entitled to qualified immunity is moot); *Cagle v. Sutherland*, 334 F.3d 980, 989 (11th Cir. 2003) (with regard to a jail suicide, because no underlying constitutional violation existed with regard to deliberate

indifference to a known risk of suicide, the sheriff, as the supervisor, was entitled to summary judgment); *Bukowsky v. City of Akron*, 326 F.3d 702, 712-13 (6th Cir. 2003) ("Because the City . . . can only be held liable if there is a showing of liability on the part of its officials, the determination that the City's officials did not violate the plaintiffs' constitutional rights resolves the claim against the City as well."); *Proffitt v. Ridgway*, 279 F.3d 503, 507 (7th Cir. 2002) (because the officer did not violate the arrestee's constitutional rights, the city was in the clear as well); *Livsey v. Salt Lake County*, 275 F.3d 952, 958 (10th Cir. 2001) ("A municipality may not be held liable for the actions of its employees if those actions do not constitute a violation of a plaintiff's constitutional rights."); *Trigalet v. City of Tulsa*, 239 F.3d 1150 (10th Cir. 2001) (city could not be held liable under § 1983 in the absence of a constitutional violation by police officers; this is true even if city's policies, training, and supervision of other officers were unconstitutional); *Kiser v. City of Huron*, 219 F.3d 814, 816 (8th Cir. 2000) (city could not be held liable under § 1983 for the alleged failure to train police officers adequately when the underlying warrantless arrest was supported by probable cause); *Scott v. Clay County*, 205 F.3d 867, 879 (6th Cir. 2000) (court's ruling that no officer had deprived plaintiff of any constitutional right defeated the claim against county as well).

II. THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY HELD THAT SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE COUNTY OFFICERS AND THE COUNTY; THERE WAS NO DELIBERATE INDIFFERENCE TO ANY SERIOUS MEDICAL NEED INVOLVING DECEDENT GINN.

In order to recover under 42 U.S.C. § 1983 against any of the County Defendants, Martinez was required to show that the officers were deliberately indifferent to Ginn's serious medical needs, and that this was the cause of his death. The Tenth Circuit correctly upheld the District Court's granting of summary judgment to County Defendants. Because the defendants did not violate Ginn's constitutional rights, the court held that there was no need to address whether those rights were clearly established for qualified immunity purposes. *Martinez v. Beggs*, 563 F.3d 1082, 1088 (10th Cir. 2009).

In this case, the court of appeals held that arresting officers and custodian officers had no reason to suspect that the detainee, who was intoxicated, posed a risk of heart attack and death, as required to support the § 1983 claim that the officers violated the Fourteenth Amendment by allegedly being deliberately indifferent to the detainee's serious medical needs. *Martinez*, 563 F.3d at 1090-91. The court observed that Ginn was asked by an officer who first arrived at the scene, Kirkland, if he was all right and if he needed any medical assistance. Ginn said he was

all right and did not need medical assistance. *Id.* at 1085. The supervisor who arrived at the scene, Lt. Barbara McSwain, told the officers she knew Ginn personally and that Ginn was an alcoholic. *Id.* at 1085. The officers told Ginn that if he did not leave the third party's property, they would have no choice but to arrest him for public intoxication, but Ginn refused to leave. *Id.* He was arrested for public intoxication.

Ginn was then taken to the Cleveland County Detention Center. Ginn was able to walk into the detention center with assistance from the two receiving detention officers. *Id.* at 1086-87. These two detention officers, Brandon and Epps, took him to a cell and Ginn complied with the request to kneel down so his handcuffs could be removed. Brandon, Epps and Kirkland last saw Ginn alive and resting his arms on the cell bench. *Id.* at 1087. Approximately three hours after Ginn first arrived, Brandon returned to the receiving cell and found Ginn dead, with his body in a kneeling position. *Id.* at 1087. The cause of death was sudden heart attack due to coronary artery disease, and that the death was caused by heart attack rather than acute alcohol intoxication. The medical examiner stated in her report that the acute alcohol intoxication would be a contributing factor to the death. *Id.* at 1087.

In *Martinez*, 563 F.3d at 1089, the Tenth Circuit cited the case of *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) and noted that a prison official cannot be liable under the Eighth Amendment for denying an

inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to the inmate's health or safety. The court in *Martinez* correctly applied *Farmer*, holding that an official alleged to have been deliberately indifferent must be both aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. *Id.* The court observed that the Supreme Court has cautioned that an obvious risk cannot conclusively establish an inference that the official subjectively knew of the substantial risk of harm, because a prison official may show that the obvious escaped him. *Id.* at 1089.

The court of appeals stated that in a deliberate indifference case involving a suicide, a plaintiff is required to show that defendants were deliberately indifferent to the specific risk of suicide, and not merely to the risk of intoxication. *Id.* at 1089. The court of appeals' opinion was consistent with its previous opinions on a similar issue. *See Estate of Hocker v. Walsh*, 22 F.3d 995, 1000 (10th Cir. 1994) (holding that a jail detainee's intoxication alone is not sufficient to impose § 1983 liability for a subsequent suicide; the court upheld the granting of summary judgment in favor of Cleveland County and its sheriff in a jail suicide case where the jail detention staff did not know and had no reason to know of a specific risk of suicide). It is also consistent with other federal court holdings in this issue. *See Hines v. Henson*, 293 Fed. Appx. 261, 262-63 (5th Cir. 2008) (summary

judgment upheld where officers were unaware that decedent had a stroke prior to his arrest, where § 1983 plaintiff was arrested for public intoxication, transported to jail exhibiting signs of intoxication and suffered a stroke after release); *Hall v. County of Nemaha*, 509 F. Supp. 2d 821, 825, 833 (D. Neb. 2007) (summary judgment denied to jailer who was aware that arrestee had ingested methamphetamine, but summary judgment was upheld with regard to arresting officers who were unaware of ingestion of methamphetamine and arrestee acted like an intoxicated person who appeared to suffer nothing more than a drug induced stupor while in jail); *Patrick v. Lewis*, 397 F. Supp. 2d 1134, 1141-42 (D. Minn. 2005) (overnight jailer was not deliberately indifferent to arrestee's serious medical needs despite knowledge of arrestee's intoxication where he appeared to not have a medical need).

In the present case, the sufficiently serious subjective harm that Ginn faced was heart attack and death, not acute intoxication. *Martinez*, 563 F.3d at 1090. The court of appeals agreed with the district court's determination that there was no evidence in the record of any symptoms or signs that indicated that Ginn would suffer a heart attack. *Id.* The court stated that the officers subjectively knew that Ginn was intoxicated, but there is no evidence to show that anyone would have known that Ginn would face an imminent heart attack or death, much less that the individual county defendants subjectively knew that Ginn was at risk of heart attack or death. *Id.* at 1090.

In *Martinez*, the court of appeals pointed out that Ginn was conscious, on his feet, argumentative and cognizant that he was being arrested. *Id.* at 1091. Ginn was not unconscious and showed no obvious symptoms indicating a risk of serious harm. *Id.* The court held that nothing in the record indicated that Ginn exhibited symptoms that would predict his imminent heart attack or death.

As was noted, to establish deliberate indifference, the record must show that officers knew of and disregarded an excessive risk to Mr. Ginn's health and safety. The record in this case did not show facts that from which an inference could be drawn that a substantial risk of heart attack and death existed and that the defendants actually draw that inference. There was nothing to indicate that Ginn needed medical treatment, and he declined it when it was offered to him. Ginn did not have any medications of any kind on his person, and he did not have any medical ID bracelet or similar item, indicating he had any kind of medical condition, which would have alerted County Officers to the alleged need for medical treatment. Furthermore, there is no case law which, when considered with the facts discussed above, would require County Officers to have taken Ginn to a medical facility, in lieu of incarceration, or to have given Ginn a breathalyzer test to determine his level of intoxication.

When Ginn was arrested, even though he did not appear to be injured in any way, Kirkland offered him medical assistance, but Ginn declined his offer. Aplt.

App. at 92; 101. Ginn told Kirkland he was alright. Aplt. App. at 92. Ginn displayed no external injuries. Aplt. App. at 94. Edwards asked Ginn is he had ingested anything except alcohol, and Ginn told him that he had not. Aplt. App. at 103.

On the way to jail, Epps asked Ginn if he was alright, and Ginn said that he was. Aplt. App. at 119. When they arrived at the jail, Ginn was awake. Upon arriving at the jail, Ginn attempted to kick Brandon as Ginn was getting out of the car. Aplt. App. at 114.

When Ginn was placed in his cell at the CCDC, Ginn was able to follow the instructions of the jailers. When the jailers left Ginn, he was conscious. Aplt. App. at 115; 120. He never requested medical assistance from any jailer. Aplt. App. at 116; 120.

Ginn was conscious at the time of arrest and at the time he was placed in the jail cell. Aplt. App. at 119-120. Ginn made no complaints of pain or distress or of a heart condition, and displayed no sign of heaving ingested drugs. Ginn had no breathing problems, no mental health issues, and had no medical identification or medicine on his person. There were no complaints from Mr. Ginn of any pain or distress. Aplt. App. at 120; 126. Ginn made no request for assistance. Aplt. App. at 94; 96. Ginn had no signs of external injuries. Aplt. App. at 94. The officers did not know what Ginn's blood alcohol level was.

Ginn had no serious health condition of which any officer was aware. Ginn never vomited and never exhibited choking. There were no signs that Ginn

would suffer a heart attack, or that he was in any pain or distress. Ginn never grabbed his heart area, or complained of numbness in his arms. There was no indication that Ginn was mentally ill. There was no mention by Ginn of any previous heart condition. Ginn never said he was sick. Ginn was merely intoxicated. When the officers left the cell, Ginn was conscious. Aplt. App. at 120.

The Tenth Circuit correctly held that to be liable under 42 U.S.C. § 1983, the officers must be aware of the facts from which an inference could be drawn that a substantial risk of serious harm exists, and they must also actually draw the inference. *Martinez*, 563 F.3d at 1089. In this case, there was nothing to show that officers were aware that Ginn faced a substantial risk of a heart attack and required medical attention.

Martinez has also contended that the County Officers should have ascertained Ginn's level of intoxication when he was brought to the CCDC. However, under Oklahoma law, evidence of the alcohol concentration of a person's breath or blood is not required to arrest or charge that person for public intoxication. Okla. Stat. tit. 47, §§ 751-754; *Findlay v. City of Tulsa*, 561 P.2d 980, 984-85 (Okla. Crim. App. 1997) (holding that a defendant arrested for public intoxication was not entitled to a breathalyzer or blood test). Therefore, Ginn was not given a breathalyzer to determine the level of his intoxication since he was arrested for public intoxication. Aplt. App. at 109-110.

The persons present at the scene of the arrest had significant training and experience with regard to handling medical issues. Lt. McSwain had been a hospital Naval corpsman for six years and an EMT in New York state for ten years. Aplt. App. at 107. Kirkland was a twenty-one year Marine Corps veteran. Aplt. App. at 91; 228. Kirkland had been a drug abuse counselor in the Marines for approximately the last 1½ years he was in the Marine Corps. Aplt. App. at 229-230. The Sheriff's office provided CPR and first aid classes to its officers. Aplt. App. at 261.

Furthermore, the persons who came in contact at the jail with Ginn, County Officers Brandon and Epps, were experienced with certifications and extensive training. Aplt. App. at 113; 118. And Brandon had first aid training in the United States military and served two tours of duty and had training as a certified Combat Life Saver. Aplt. App. at 261.

The decision of the Tenth Circuit was correct, and this Court should deny this Petition.

CONCLUSION

The Petition is unfounded, and there is no sound basis to grant it. County Officers and the County respectfully request that the Petition be denied.

Respectfully submitted,

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